A

PP v. LEE CHEE KIANG

HIGH COURT SABAH & SARAWAK, KUCHING
STEPHEN CHUNG J
[CRIMINAL APPEAL NO: KCH-41 AC-13-8-2017]
23 FEBRUARY 2018

B

CRIMINAL LAW: *Offences – False impersonation – Offence of impersonating as public servant – Accused person carried out inspection on complainant's house and attempted to collect monies from complainant for allegedly tampering with electricity meter – Whether ingredients of offence satisfied – Penal Code, s. 170*

C

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal and discharge – Appeal by prosecution – Accused person charged at Magistrate's Court for impersonating as public servant – Accused person carried out inspection on complainant's house and attempted to collect monies from complainant for allegedly tampering with electricity meter – Accused person acquitted and discharged without being called to enter defence – Whether ingredients of offence satisfied – Whether prima facie case established – Whether accused person ought to be called to enter defence – Penal Code, s. 170*

D

EVIDENCE: *Witness – Credibility – Accused person charged at Magistrate's Court for impersonating as public servant – Accused person carried out inspection on complainant's house and attempted to collect monies from complainant for allegedly tampering with electricity meter – Complainant testified as witness – Whether complainant credible witness – Whether there was consistency in complainant's evidence – Whether complainant's evidence supported and corroborated – Whether there were doubts on complainant's identification of accused person – Whether evidence admissible – Penal Code, s. 170*

E

F

The respondent went to the complainant's ('PW2') house and introduced himself to the latter as an employee of Syarikat Sesco Bhd ('SESCO'). After carrying out an inspection, the respondent informed PW2 that the electricity meter had been tampered with and PW2 had stolen/used electricity illegally. The respondent demanded PW2 to pay RM1,200 or he would be reported for theft. PW2 denied the theft and told the respondent that he did not have such amount and further arranged to meet the respondent on Monday to make the payment. Doubtful over the allegations, PW2 went to SESCO's office to make a complaint and was advised to lodge a police report against the respondent. Following an investigation, the respondent was charged at the Magistrate's Court under s. 170 of the Penal Code for falsely impersonating as a public servant of SESCO, holding such office and, in such assumed character, attempted to collect monies, under colour of such office. The Magistrate decided the case primarily on the credibility of PW2. The Magistrate held that PW2 was not a credible witness as (i) there was a discrepancy in PW2's testimony that the respondent was wearing a shining SESCO jacket but no SESCO jacket was seized from the respondent; (ii) there

G

H

I

was an inordinate delay as PW2 lodged a police report three days after the alleged incident; (iii) there was no evidence to support and no independent witness to corroborate PW2's assertion that the respondent attempted to collect RM1,200 from him and nobody knew the actual telephone conversation with the respondent; and (iv) there were doubts on PW2's identification of the respondent. At the end of the prosecution's case, the Magistrate found that the prosecution failed to satisfy the ingredients of the charge and, therefore, failed to establish a *prima facie* case against the respondent. The respondent was acquitted and discharged from the charge. Hence, the present appeal.

Held (allowing appeal):

(1) The prosecution did not tender and the defence did not apply to tender PW2's statement under s. 112 of the Criminal Procedure Code ('the s. 112 statement') to challenge or impeach the evidence or credibility of PW2 in respect of the shining jacket. There was no evidence that the s. 112 statement was adduced before the court. Therefore, The Magistrate's decision was against the weight of evidence and she had erred in deciding that what PW2 said about the jacket did not tally with what he said in his s. 112 statement. PW2 did not say that the respondent wore a SESCO jacket but it looked like one. The police report lodged by PW2 was a first information report and it was not a piece of substantive evidence. The failure of the police in not seizing the jacket from the respondent should not be considered as a factor against PW2 in assessing his credibility as a witness. (paras 10 & 11)

(2) PW2 had given his explanation, during trial as to why he did not lodge the police report earlier. The respondent went to PW2's house on Saturday (14 October 2016). The SESCO's office was closed on Saturday and Sunday. PW2 went to SESCO's office on Monday (16 October 2016) where he was advised to lodge a police report, which he did the next day (17 October 2016). Based on the dates, the facts and circumstances of the case and the explanation given, it could not be said that there was an inordinate delay on the part of PW2 in lodging the police report. This could not be used against PW2 as to his credibility. (paras 13 & 14)

(3) The conviction of an accused person may proceed upon the uncorroborated evidence of one witness. Corroboration could come in different forms, documentary or oral, direct or circumstantial. The courts could act on the testimony of a single witness if the said witness is credible. Each case must depend on the facts and circumstances of the case. Only PW2 and the respondent were in the house. There was no one else present to verify what happened or to corroborate what PW2 or the respondent had said. In such situation, it was not possible and not necessary for the Magistrate to require the testimony of PW2 to be

corroborated before accepting it. Similarly, the phone conversations were between PW2 and the respondent and there was no requirement for the phone conversations between them to be corroborated. (paras 15-17)

(4) The respondent went to PW2's house during daytime. They were face-to-face while talking with each other. It was not a fleeting glance nor was it in poor light. PW2 testified that he could identify the respondent and he identified the respondent in court. The Magistrate had ruled that PW2 had positively identified the respondent but went on to rule that the identification parade report, prepared by one Inspector Nik Rozi, who was not called, consisted of errors, mistakes and omissions and these cast doubts on the identification by PW2 of the respondent. Since Inspector Nik Rozi was not called to testify, the Magistrate should not have admitted the report as evidence. Dock identification is admissible evidence if the court finds that the identification parade is defective. (paras 18-20)

(5) The prosecution had established each of the essential ingredients of the charge under s. 170 of the Penal Code against the respondent and successfully established a *prima facie* case against the respondent. The acquittal and discharge were set aside and the respondent was to enter defence to the charge before the same Magistrate. (paras 24 & 25)

Case(s) referred to:
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC ***(refd)***
Attan Abdul Gani v. PP [1969] 1 LNS 12 HC ***(refd)***
Bakri Mohamad Ali v. PP [2010] 1 CLJ 610 HC ***(refd)***
Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA ***(refd)***
Prabah Sinnathamby v. PP [2010] 2 CLJ 690 CA ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Penal Code, ss. 21(i), 170, 171
Sarawak Electricity Supply Corporation Ordinance 1962 (Sarawak), s. 13

For the appellant - Mohd Fillanny Siji; DPP
For the respondent - Chen Ted Choi; M/s Eric & Alan Chen Advocs

Reported by Najib Tamby

JUDGMENT

Stephen Chung J:

[1] The respondent was charged under an amended charge as follows:

> That you, on 14.10.2016 at about 4p.m. at No.11, TH ML, Jalan Matang, 93050 in the district of Kuching, in the state of Sarawak, did falsely personated as Thomas Lee (ID No.41167) as a public servant of Syarikat

Sesco Berhad, holding such office and in such assumed character attempted to collect RM1,200 from Bong Hoi Lung (No. KP:8301017-13-6105), under colour of such office, and thereby committed an offence punishable under Section 170 of the Penal Code.

[2] The respondent pleaded not guilty and claimed trial to the amended charge. At the end of the prosecution's case, the learned Magistrate ruled that the prosecution has failed to establish a *prima facie* case against the respondent who was acquitted and discharged accordingly. This is the prosecution's appeal against the order of acquittal and discharge.

[3] The grounds of the appeal include as follows:

(a) the learned Magistrate erred in law and in fact in holding that the testimony of PW2 was unreliable and uncorroborated;

(b) the learned Magistrate erred in law and in fact in holding that the prosecution has failed to prove that the accused personated some public servant despite the accused had identified himself as a SESCO employee to PW2;

(c) the learned Magistrate erred in law and fact in holding that there is inordinate delay by PW2 to lodge a police report despite the explanation given by PW2 about the delay;

(d) the learned Magistrate erred in law and fact in holding that "there was no independent witness giving testimony to corroborate PW2's allegation on the accused in this case" when there is no legal need for corroboration;

(e) the learned Magistrate erred in law and fact in holding that the identification parade report (exh. P6) has no weight due to 'plenty of errors, mistakes and omissions' despite the fact that the learned Magistrate had decided that the accused 'was positively identified by PW2 when he was asked during examination-in-chief'.

[4] The facts of the case. On Saturday, 14 October 2016, the respondent went to the complainant's (PW2) house at no. 11, TH ML, Jalan Matang, Kuching and informed PW2 that he was an employee of SESCO and identified himself as Thomas Lee. The respondent then inspected the electricity meter at PW2's house and informed PW2 that the meter had been tampered with and that PW2 had illegally used or stole electricity. The respondent asked PW2 to sign a seizure list (exh. P3) and demanded PW2 to pay a sum of RM1,200 otherwise the respondent would report the theft of electricity to higher authorities. PW2 denied the theft and told the respondent that he did not have cash of RM1,200 at that time and arranged to meet the respondent on Monday to make payment. PW2 being doubtful as to the allegations, went to the SESCO's office to make a complaint and was advised to lodge a police report against the respondent which he did on 17 October 2016.

[5] In the grounds of judgment, the Magistrate stated that the offence under s. 170 of the Penal Code required proof of three ingredients: firstly the accused personated some public servant or pretended to hold the office of a public servant; secondly he acted falsely in such personation, or he knew that he did not hold such office; and thirdly when assuming such character, the accused did or attempted to do something under colour of such office. She referred to s. 21(i) of the Penal Code and s. 13 of the Sarawak Electricity Supply Corporation Ordinance 1962 and ruled that a servant of the corporation (SESCO) shall be deemed as a public servant within the meaning of the Penal Code.

[6] She said as for the first and second ingredients, the learned DPP placed heavy reliance on the testimony of PW2 and she ruled against the credibility of PW2. As for the third ingredient, she said there was no evidence to support PW2's assertion that the accused attempted to collect RM1,200 from him. The Magistrate therefore ruled that the prosecution has failed to make out a *prima facie* case against the accused.

[7] In giving her reasons, the Magistrate referred to (a) the cross-examination of PW2 where "PW2 agreed that nobody knows the actual conversation through the telephone between him and the said Thomas Lee"; (b) that there was a discrepancy that the accused was wearing shining SESCO jacket and that no SESCO jacket/vest was seized from the accused; (c) there was no evidence to support and no independent witness to corroborate PW2's assertion that the accused attempted to collect RM1,200 from PW2; (d) there were errors, mistakes and omissions in the identification report (exh. P6) which was tendered through the investigation officer PW5; and (e) that PW2 lodged the police report three days after the alleged incident and that the PW2's credibility must be tested against the inordinate delay to lodge the police report.

[8] I shall deal with these and the grounds of appeal. It is trite that an appellate court will not readily interfere with the findings of fact arrived at by the trial court which is entrusted the primary task of evaluation of the evidence. However, the appellate court has a duty to intervene where the trial court has so fundamentally misdirected itself that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion: *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395. The appellate court, in order to reverse, must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. In doing so, an appellate court has a duty to check by critical examination of the whole of the evidence and the trial judge's conclusions including the truthfulness of a witness, whether the story is inherently improbable or whether it is consistent with the facts and circumstances of the case, whether any corroboration or any credible extrinsic circumstantial evidence which substantiates his evidence: see *Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043.

[9] The trial judge decided the case primarily on the credibility of PW2. PW2 testified that the respondent went to his house wearing a jacket. Subsequently, he was asked by the DPP to describe the jacket worn by the respondent and he said the respondent "was wearing a shining jacket just like a jacket SESCO man wear without any name". Reading the notes of proceedings, counsel for the respondent did not question PW2 about the jacket, whether it was shining or whether it was a SESCO jacket or vest. Counsel for the respondent did not put to PW2 that what he had said about the jacket did not tally with what he said in his s. 112 of the Criminal Procedure Code statement. Counsel for the respondent also did not challenge the credibility of PW2 because he did not mention about the shining jacket in his police report.

[10] The prosecution did not tender and the defence did not apply to tender the s. 112 statement of PW2 to challenge or impeach the evidence or credibility of PW2 in respect of the shining jacket. There was no evidence that the s. 112 statement of PW2 was before the court. Therefore, in making her decision that what PW2 had said about the jacket did not tally with what he said in his s. 112 statement was against the weight of evidence and had erred.

[11] It should be noted that PW2 did not say that the respondent wore a SESCO jacket but it looked like one. The police report lodged by PW2 was a first information report. It was not a piece of substantive evidence. The failure of the police in not seizing the jacket from the respondent should not be considered as a factor against PW2 in assessing his credibility as a witness.

[12] Further, it is not an essential ingredient under s. 170 of the Penal Code for the police to seize and produce the jacket in court as evidence. This contrasts with the requirement under s. 171 of the Penal Code.

[13] One of the reasons she gave was that PW2 had delayed in lodging the police report. It should be noted that the respondent went to the house of PW2 on a Saturday, namely on 14 October 2016, where the respondent alleged that PW2 had tampered with the electricity meter and demanded payment of the sum of RM1,200. The SESCO office was closed on Saturday and Sunday. PW2 being suspicious with the demand, on Monday, 16 October 2016, went to the SESCO office to make a complaint against the respondent where PW2 was advised to lodge a police report which he did the following day, namely on Tuesday, 17 October 2016. During the trial, PW2 had given his explanation why he did not lodge the police report earlier.

[14] Based on the dates, the facts and circumstances of the case and the explanation given, it could not be said that there was an inordinate delay on the part of PW2 in lodging the police report. That could not be used against PW2 as to his credibility. The test should be whether his testimony was so inherently incredible or improbable that a prudent man ought not to accept it.

[15] The Magistrate ruled that there was no evidence to support PW2's assertion that the respondent attempted to collect RM1,200 from him and there was no independent witness giving independent testimony to corroborate PW2's allegation against the respondent. As a general rule, the conviction of an accused person may proceed upon the uncorroborated evidence of one witness: see *Attan Abdul Gani v. PP* [1969] 1 LNS 12; [1970] 2 MLJ 143. Corroboration can come in different form, documentary or oral, direct or circumstantial. Courts can act on the testimony of a single witness if the said witness is credible. Each case must depend on the facts and circumstances of the case: *Bakri Mohamad Ali v. PP* [2010] 1 CLJ 610.

[16] In this case, when the respondent went to the house of PW2, only PW2 and the respondent were in the house. There was no one else present or in the house to verify what happened or to corroborate what PW2 or the respondent had said. In that situation, it was not possible and not necessary for the trial judge to require that the testimony of PW2 to be corroborated before accepting it. In requiring such corroboration, the trial judge had erred.

[17] Similarly, the phone conversations were between PW2 and the respondent and there was no requirement for the phone conversations between them to be corroborated. Based on the cross-examinations and the evidence adduced, counsel for the respondent did not submit that there were no such conversations between PW2 and the respondent.

[18] On the identification of the respondent by PW2, the Magistrate had ruled that "it is true that the accused was positively identified by PW2 when he was asked to during examination-in-chief by pointing to the accused's dock." However, the trial judge went on to rule that the identification parade report prepared by Inspector Nik Rozi bin Nik Mar, who was not called, but was tendered through the investigation officer (PW5), consisted of errors, mistakes and omissions and these cast doubts on the identification by PW2 of the respondent.

[19] Since Insp Nik Rozi bin Nik Mar was not called to testify, the trial judge should not have admitted the report as evidence. It is settled law that inadmissible evidence does not become admissible simply by reason of failure to object to its admission. Yet she used it against PW2 as to his credibility, in particular, the identification of the respondent.

[20] The evidence showed that the respondent went to the house of PW2 during daytime. They were face to face while talking with each other. It was not a fleeting glance or that it was in poor light. PW2 testified that he could identify the respondent. He identified the respondent in court and the trial judge had said in the grounds of judgment that PW2 had positively identified the respondent. She could not turn around and then ruled that based on the identification parade report that PW2's identification of the respondent was suspect. It has been held that dock identification is admissible evidence if the

court finds that the identification parade is defective: see *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597; *Prabah Sinnathamby v. PP* [2010] 2 CLJ 690; [2010] 5 MLJ 252.

[21] Based on the testimony of PW3, the respondent was not an employee or an ex-employee or an agent of SESCO and was not authorised to enter and inspect any electricity meter in a premise. He was not authorised to issue any seizure list. PW3 said that the seizure list (P3) was not issued by SESCO.

[22] On evidence adduced and the cross-examination questions put to PW2 by counsel for the respondent, it was not in dispute that the respondent had gone to the house of PW2 where he told PW2 and held himself out to be Thomas Lee and an employee from SESCO where he intended to inspect the electricity meter inside the house of PW2. After he had inspected the meter, he told PW2 that the meter had been tampered and that PW2 had illegally used electricity supplied by SESCO. It was clear that the respondent held himself out as a Thomas Lee and an employee of SESCO.

[23] The evidence showed that he was not Thomas Lee and he was not employed by and was not an employee of SESCO. In doing so, he had falsely impersonated or held himself out as Thomas Lee and as an employee of SESCO. In holding himself out as an employee of SESCO in attempting to collect the payment of RM1,200 from PW2, the respondent had committed an offence under s. 170 of the Penal Code.

[24] On a critical examination of the record of appeal, the prosecution had established each of the essential ingredients of the charge under s. 170 of the Penal Code against the respondent and the prosecution had made out a *prima facie* case against the respondent. The trial judge had erred in acquitting and discharging the respondent under the charge.

[25] For the reasons given, the learned Magistrate should have called the respondent to enter defence to the charge preferred against him. The appeal is allowed, the acquittal and discharge are set aside and the respondent is to enter defence to the charge before the same Magistrate.